ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of Bell Atlantic Telephone Cos. For Forbearance from Regulation As Dominant Carriers in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, DC; Vermont and Virginia	)))))))))	CC Docket No. 99-24 DOCKET FILE COPY ORIGINAL

OPPOSITION OF SPRINT CORPORATION

Pursuant to the Commission's Public Notice, DA 99-224 (released January 21, 1999), Sprint Corporation ("Sprint") respectfully submits its opposition to the above-captioned Petition ("Petition") filed by the Bell Atlantic Telephone Companies ("Bell Atlantic").

I. INTRODUCTION AND SUMMARY

Bell Atlantic seeks forbearance under Section 10 of the Communications Act of 1934, as amended, 47 USC §10, from dominant carrier regulation in the provision of high capacity special access services ("high capacity services") in the 12 state jurisdictions listed in the caption above. Petition at 1. Bell Atlantic claims that forbearance is in the public interest in this case because its ILECs are beginning to face competition from carriers whose networks, if used in conjunction with other Bell Atlantic facilities, can allegedly reach 90 percent of Bell Atlantic's current high capacity services customers. Petition at 1-5.

Bell Atlantic's request for forbearance should be denied. As explained in more detail below, Bell Atlantic retains market power even in the self-selected, high capacity facilities market in each of the 12 states at issue in its Petition. Thus, by its own admission, Bell Atlantic still provides at least 70 percent of the high capacity services in these jurisdictions. But even this figure is highly questionable in light of Bell Atlantic's decision not to provide the Quality Strategies Study that Bell Atlantic relies on for the 70 percent market share figure, or any of the underlying raw data that Bell Atlantic or Quality Strategies rely on for evidence of competition.

Moreover, these facilities are essential inputs used in important downstream service markets (namely, local service and exchange access) where Bell Atlantic retains a near monopoly. The need to integrate high capacity facilities with Bell Atlantic's local networks (so that competitors can use these facilities to reach the vast majority of customers taking local service in the 12 jurisdictions) results in a bottleneck which Bell Atlantic can use against competing providers of high capacity facilities by degrading the service of these rivals, by raising their costs, or by otherwise engaging in discrimination both blatant and subtle.

There is, in any case, no need for the relief urged by Bell Atlantic. The Commission's Density Zone Pricing rules already grant Bell Atlantic substantial flexibility in pricing high capacity facilities throughout its service territory. If Bell Atlantic feels threatened by nascent competition in the sale of high capacity facilities in certain areas, it can lower its prices for these facilities to contest its competitors so long as it undertakes the same reduction in other areas of equivalent density and, presumably, equivalent costs. Bell Atlantic may also make its high capacity facilities available pursuant to term and volume discounts. To grant Bell Atlantic's request will allow its ILECs to segment their markets and lower prices only where they have come under competitive pressure. The Bell Atlantic ILECs would then be able to continue to receive monopoly rents from users that have similar cost characteristics but that lack competitive choices, and to use the supranormal profits obtained from its remaining monopoly customers to charge below-cost rates in areas where competition is only beginning to present a challenge to Bell Atlantic.

The problem of such cross-subsidization is hardly a remote threat. Bell Atlantic provides high capacity facilities, local service and exchange access on a vertically and horizontally-integrated basis. Accounting constraints are inadequate to prevent Bell Atlantic from raising prices to monopoly users and then using these increases to lower its prices for high capacity facilities below its applicable costs. Price caps may be helpful in preventing such behavior, but they are hardly a panacea. This Commission and State regulatory agencies continue to carefully monitor the prices of local carriers, and yet "costless predation" is still a viable business strategy.

Finally, the Commission is already actively reviewing proposals from regional Bell Operating Companies ("RBOCs") for additional pricing flexibility for their access services in the Access Charge Reform proceedings. Public Notice, FCC 98-256 (released October 5, 1998). Petitions such as this one are simply attempts by the RBOCs to have as many "bites at the apple" as possible. Sprint respectfully requests that the Commission preserve its limited resources for completing more significant proceedings already before it, especially those in which the instant issues have already been raised. Until then, the Commission should refrain from engaging in any serious consideration of the redundant and multiple RBOC petitions, including this one.

II. THE COMMISSION SHOULD CAREFULLY CONSIDER WHETHER IT IS IN THE PUBLIC INTEREST FOR IT TO CONSIDER OVERLY NARROW REQUESTS FOR FORBEARANCE FROM DOMINANT CARRIER REGULATION

As noted, Bell Atlantic already has substantial pricing flexibility. There can be no serious argument that it is so burdened by existing regulation that it will be unable to compete fairly against emerging competition for high capacity facilities. While Bell Atlantic goes to great lengths to pattern its request for non-dominant treatment after that of AT&T's, the fact remains that AT&T's Motion covered a substantially larger scale and scope of services. See Motion for Reclassification of American Telephone and Telegraph Company as a Non-Dominant Carrier, CC Docket No. 79-252, filed September 22, 1994; see also Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271 (1995) ("AT&T Domestic Non-Dominance Order").

In the AT&T Domestic Non-Dominance Order, the Commission agreed with AT&T that the relevant market should be defined as all interstate, domestic interexchange services. Id. at ¶ 21 (emphasis supplied). Such a market essentially encompassed all of AT&T's interexchange services, with the exception of international services. After a careful analysis of all of the relevant services offered in the defined market, the Commission determined that while AT&T possessed market power with respect to a few discrete services, it lacked market power in the overall nationwide interstate, domestic interexchange market. Id. at ¶ 39. In contrast, Bell Atlantic seeks non-dominant regulatory treatment for a narrowly defined service that competitors have only recently begun to offer in small geographical areas (i.e., dense urban areas).

This is the fourth of five RBOC attempts thus far to obtain piecemeal regulatory reclassification of their high capacity facilities.[1] In its opposition to the first RBOC forbearance petition, Sprint warned that petitions of such minute scale and scope would needlessly suck up enormous resources of the Commission and all other interested parties. See Sprint Comments, CC Docket 98-157 at 4. Unfortunately, the RBOCs have proven Sprint's prediction to be correct. The recent flurry of copycat petitions augurs for more of the same from the RBOCs. After all, the petitions filed thus far cover only two of the many RBOC services offered in small

[1] In chronological order, the five RBOC forbearance petitions are: 1) U S West Phoenix Petition, CC Docket No. 98-157 (filed Aug. 24, 1998); 2) Petition of SBC Communications, Inc. for forbearance in 14 MSAs, CC Docket No. 98-227 (filed Dec. 7, 1998); 3) U S West Seattle Petition, CC Docket 99-1 (filed Dec. 30, 1998); 4) Petition of Bell

geographical areas and subject to dominant carrier regulation. To deter the RBOCs from attempting to overwhelm the Commission's limited resources, the Commission should clearly indicate that it will not seriously entertain such narrow and redundant forbearance petitions.

Granting petitions such as Bell Atlantic's on a piecemeal basis would also inevitably lead to inconsistencies. Each petition would require an in-depth, fact-intensive competitive analysis for each service offered in small geographical areas.[2] Small differences in the factual circumstances surrounding the provision of services in each narrow geographical area would, in all likelihood, give rise to inconsistent rulings. The Commission would be engaged in making increasingly narrow distinctions and determinations concerning small market segments in smaller and smaller geographical areas. Ultimately, the Commission's analytical exercises would resemble that of the proverbial medieval monks who would debate how many angels can fit on the head of a pin. The probability of inconsistent rulings would increase as the product and geographical markets became smaller. To avoid this result, the Commission should make clear that it will not rule on petitions for non-dominance such as those filed by U S West, SBC, Ameritech and Bell Atlantic, unless they cover a wider range of products and services, such as all residential or business local access services in a state or an entire RBOC region.

Atlantic Telephone Companies for Forbearance in 12 jurisdictions, CC Docket 99-24 (filed January 20, 1999); and 5) Petition of Ameritech for Forbearance in the Chicago LATA, CC Docket No. 99-65 (filed February 5, 1999).

[2] Unlike previous RBOC petitions that limited their forbearance requests to Metropolitan Statistical Areas ("MSAs"), Bell Atlantic seeks regulatory forbearance on a state-wide basis. For the purposes of determining the degree of competition in high capacity services, this is a distinction without a difference. As Bell Atlantic admits, it faces little or no competition in areas outside of MSAs. It therefore must rely on "evidence" of competition within MSAs to support its state-wide forbearance requests. Thus, Bell Atlantic's petition, just like those filed before it, would require competitive analyses of niche services offered in very small geographical areas. Of course, Bell Atlantic's petition, if granted, would cause greater competitive harm than the previous RBOC petitions simply because the geographic areas at issue here (entire states) are larger than those addressed by the other RBOC petitions (MSAs).

III. BELL ATLANTIC RETAINS MARKET POWER IN THE HIGH CAPACITY FACILITIES MARKET

A. Bell Atlantic controls bottleneck local exchange and exchange access services

High capacity circuits are used by some carriers and end users in order to provide local exchange and exchange access services. As such, these dedicated circuits constitute an essential input for a defined set of customers. Bell Atlantic contends that this upstream market exhibits indicia of competition and therefore the Commission should not regulate it as dominant for this market. However, Bell Atlantic continues to maintain a virtual monopoly in the non-competitive downstream markets of local exchange and exchange access services. As a result, Bell Atlantic can, absent dominant carrier regulation, exercise its downstream market power to the detriment of consumers and providers of dedicated circuits.

Bell Atlantic has both the ability and the incentive to exercise its bottleneck control over its local exchange and exchange access services in order to harm competition in the high capacity services market. Any choice that carriers or end users may have over the supplier of high capacity circuits would be undermined by Bell Atlantic's ability to act anticompetitively. For example, Bell Atlantic could charge higher interconnection fees or degrade the quality of interconnection to those customers who subscribe to competitive dedicated circuit providers. Because dedicated circuit subscribers have no choice but to subscribe to Bell Atlantic's local exchange and exchange access services, they will not be able to respond to this type of anticompetitive conduct. Rather, they would have only the choice of keeping their dedicated circuit provider and accepting higher priced or lower quality local services, or switch to Bell Atlantic for their dedicated circuit needs. Until Bell Atlantic opens its local markets to competition, the Commission must maintain dominant carrier regulation over Bell Atlantic's provision of high capacity facilities.

In addition to maintaining monopoly power over local exchange and exchange access services, Bell Atlantic also has bottleneck control over adjacent inputs that are essential for the provision of local services. For example, in those areas where a Bell Atlantic Company is the incumbent local exchange carrier, it has bottleneck control over interconnection and local switching services. Bell Atlantic could raise its charges for these services and use the additional revenues to cross-subsidize its dedicated circuit offerings. In doing so, Bell Atlantic would at least be able to harm competitive providers of high capacity facilities and, conceivably, would be able to drive them out of the market entirely. Neither accounting regulation nor price caps on their own provide effective safeguards against such anticompetitive behavior. In order to help prevent Bell Atlantic from engaging in cross-subsidization, the Commission must continue to require Bell Atlantic to file tariffs and cost support for its provision of dedicated circuits.

B. Bell Atlantic maintains a very high market share in each of the relevant markets

Perhaps the most obvious indication of Bell Atlantic's dominance is its market shares for the markets it purports to have identified. In the putative overall high capacity circuits market (which includes high capacity provider and transport circuits), Bell Atlantic admits that it maintains at least a 70 percent market share. Such a high market share indicates that this market segment is highly concentrated and that Bell Atlantic, with overwhelming market share, maintains market power.

But even this figure is highly questionable in light of Bell Atlantic's decision not to provide the Quality Strategies Study that Bell Atlantic relies on for the 70 percent market share figure, or any of the underlying raw data that Bell Atlantic or Quality Strategies rely on for evidence of competition. Bell Atlantic appears to ask the Commission and other interested parties to take it on faith that its purported "Demonstration of Competition," Petition at

Attachment A, accurately describes the state of competition in the markets at issue; that this "Demonstration" conclusively shows that its ILECs face "robust competition;" and that under these conditions, the Commission is required to grant its forbearance request. But because the Quality Strategies Study and the pertinent raw data are unavailable for public scrutiny, the "Demonstration" provides no more evidence of Bell Atlantic's declining market power in the putative high capacity market than would a Bell Atlantic press release.

An even more fundamental problem with Bell Atlantic's Petition is its exclusive reliance on DS-1 equivalent circuits for measuring market shares. Affidavit of Karl McDermott and William Taylor, Attachment C at 20. Notwithstanding Bell Atlantic's experts statement to the contrary, id., the Commission has consistently considered revenues at least as important as capacity, if not more so, in gauging the amount of competition in a particular market. See, AT&T Domestic Non-Dominance Order, 11 FCC Rcd 3271 (1995). Thus, no meaningful analysis of Bell Atlantic's market power can begin until a comparison can be made between the high capacity revenues earned by Bell Atlantic and its facilities-based competitors. Such revenue figures would allow for a comparison of paying customers to Bell Atlantic and its competitors and would provide a more complete portrait of the high capacity market in the 12 jurisdictions at issue.

But even if Bell Atlantic were correct in its assertion that capacity alone is the most appropriate barometer of the level of competition (and Sprint believes that Bell Atlantic is incorrect), the manner in which Bell Atlantic appears to have counted circuits skews market share measurements. The Petition notes that market shares were based exclusively upon DS-1 equivalents and that one DS-3 (45 Mbps) circuit is counted as 28 DS-1 circuits. See e.g., Petition at Attachment A at 3; Attachment B at 3. While this relationship makes sense from an engineering standpoint, Sprint notes that a DS-3 circuit is not 28 times as expensive as a DS-1 circuit. Thus, customers will order DS-3 service even if they do not need all of the capacity available in the DS-3.

If a carrier has a customer mix that is more heavily weighted towards DS-1 rather than DS-3 customers, that carrier will derive greater revenue per DS-1 equivalent than a carrier whose customer mix leans more towards DS-3 customers. This is so even though the nominal amount of DS-1 equivalent circuits provided by both carriers is identical. Bell Atlantic would be expected to have a higher proportion of DS-1 customers generally than its competitors because of the greater ubiquity of its facilities. Were revenue figures disclosed, they would most likely demonstrate that Bell Atlantic also has a disproportionately greater share of high capacity revenues and thus a much greater market share of the high capacity facilities market.

In the putative retail market,[3] Bell Atlantic states that competitors control between 67 and 79 percent of demand in "major urban markets." Petition at Attachment B at 11. However, Bell Atlantic, by its own admission, provisions 70 percent of all high capacity circuits, even though it may have a billing relationship with end users for only between 21 and 33 percent of these circuits. It is not clear what comfort Bell Atlantic derives from the fact that there is a "secondary" or "resale" market for high capacity facilities. Bell Atlantic does not participate in this secondary market. Rather, it sells the high capacity facilities which it, not the reselling carriers, provides. It is in the high capacity facilities market where Bell Atlantic seeks to be declared non-dominant based on its claims that it no longer possesses market power. Bell Atlantic's share of this market is, of course, critical to its assertion of non-dominance.

The existence of a secondary market for such facilities is irrelevant. For example, if Bell

[3] The retail market consists of carriers who sell switched access and high capacity services to end users directly.

Atlantic had 100 percent of the market for high capacity facilities, it would have complete control of this facilities market. And, this would be true regardless of whether a lively secondary market for such facilities existed or not. As explained by the court in Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), cert. den. 479 U.S. 1033 (1987) at 221:

> The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists, ... it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.

Because Bell Atlantic actually provides more than 70 percent of the circuits, even though it may not bill them, the possibilities of facilities-based competition (and the competitive check such competition provides) are limited. For this reason, the Commission should be slow to attach significance to Bell Atlantic's retail market share figures.

Moreover, Bell Atlantic's claims that it is rapidly losing market share ring hollow in view of the substantial changes that are likely forthcoming in access charges. Demand for high capacity circuits is greatly affected by the pricing of switched versus special access service under the current access charge regime. The Commission has already identified the usage sensitive carrier common line (CCL) rate structure as "an economically inefficient cost recovery mechanism and implicit subsidy."[4] As the Commission is well aware, this usage sensitive rate structure results in larger users overpaying for access, driving many of them to avoid switched access fees by substituting high capacity service linking them directly with interexchange

[4] Access Charge Reform, First Report and Order, 12 FCC Rcd 15982 (1997), *recon. pending, aff'd in part sub nom. Southwestern Bell v. FCC,* Case No. 97-2618, Eighth Circuit, August 19, 1998.

carriers ("bypass").

As the Commission reforms its interstate access charge regime, it is clear that the subsidies inherent in the current CCL rate element will diminish, rendering the bypass of switched access through high capacity services much less attractive. As a result, the market for high capacity services is likely to shrink and some providers may exit the market. For Bell Atlantic to assume that its past loss of market share will continue unabated in the future is overly simplistic and ignores the likely effect of forthcoming regulatory actions.

Bell Atlantic also mistakenly claims that, because existing competitors have significant amounts of fiber in the ground, and because they have collocated in Bell Atlantic central offices, these competitors can readily provide service to about 90 percent of Bell Atlantic's special access demand. See e.g., Attachment B at 7-8. The fact that Bell Atlantic's competitors may have fiber in the ground and collocation agreements does not equate to the ability to absorb Bell Atlantic's high capacity demand quickly enough to discipline Bell Atlantic's pricing behavior. Sprint has considerable experience with use of alternate providers of high capacity. It speaks from experience in stating that it is complicated and expensive to shift from an ILEC's high capacity circuits onto those of an alternate provider. In order to minimize potential interruptions to customers and maintain quality, such cutovers do not occur with the push of a button.

For example, individual Sprint customer circuits are manually "rolled" one by one from the ILEC to the alternate provider, usually at night when traffic is minimal. Sprint must pay both its and the ILEC's personnel overtime wages to perform this task. Moreover, the testing necessary to ensure end-to-end quality and continuity of the circuit usually requires the involvement of the alternate provider in addition to the ILEC and Sprint, complicating this task significantly.

IV. THERE IS NO NEED FOR FORBEARANCE: BELL ATLANTIC ALREADY HAS SUFFICIENT PRICING FLEXIBILITY TO ALLOW IT TO COMPETE EFFECTIVELY IN THE HIGH CAPACITY SERVICES RETAIL MARKET

Under Section 69.123 of the Commission's rules, 47 C.F.R. §69.123, independent local carriers may establish density pricing zones for special access and switched transport services. Within these zones, carriers are allowed to charge different rates for special access services. *See* 47 C.F.R. §69.123(c). Thus, the Bell Atlantic ILECs may price their special access services provided in high density areas at lower rates than it provides such services in rural areas. This rule enables the Bell Atlantic ILECs to respond to incipient competition in urban areas by lowering its prices in these pricing zones.

Bell Atlantic appears to complain that its ILECs cannot compete effectively because Section 69.123 requires that it must maintain uniform pricing for each density pricing zone within a study area. 47 C.F.R. §69.123(a). Essentially, Bell Atlantic is complaining that in order to lower the price of its high capacity services, it would also have to lower the price of those services in the same density zone areas in the relevant study areas. Of course, because the Bell Atlantic ILECs do not face the same degree of competition throughout their markets, they would like to maintain the above-cost rates they are able to charge in the non-competitive areas. Thus, the relief sought here is anticompetitive and not in the public interest. If Bell Atlantic needs to compete more effectively in dense urban areas, it can, under section 69.123, solve its "dilemma" by reducing its prices for high capacity services throughout all of its density pricing zones in the relevant study areas. By forbearing from regulating Bell Atlantic as a dominant carrier in the 12 states at issue, the Commission would enable Bell Atlantic to segment the market by allowing it to charge virtually whatever it wants for high capacity services in those areas where it faces no competition. Sprint respectfully submits that such a result is not in the public interest.

The Commission's Density Zone Pricing rules provide a far better accommodation between the need for the Commission to allow some pricing flexibility in markets where nascent competition is pressuring existing carriers to lower rates and the need to prevent incumbents from harming competition by selectively lowering prices. Because the Bell Atlantic ILECs provide high-capacity facilities on an integrated basis with its monopoly local exchange and exchange access services, there is a palpable threat of cross-subsidization. The threat of such discriminatory actions are at least eased if any price reduction must be made available to all customers with equivalent zone densities and, presumably, with equivalent costs. The benefits of competition are thereby spread to all similarly-situated customers, rather than being limited only to those customers that are directly targeted by competition.

In addition, Bell Atlantic can offer term and volume discounts on its high capacity services. Nothing in the Commission's rules forbids Bell Atlantic (or any other ILEC) from offering such discounts,[5] which should enable Bell Atlantic to compete fiercely throughout its territory. Bell Atlantic's status as an incumbent with by far the majority of installed facilities in all of its markets should allow it to offer term and volume discounts that would be difficult for its new competitors to match.[6]

V. BELL ATLANTIC SHOULD OPEN ITS LOCAL MARKETS TO COMPETITION

Finally, Bell Atlantic complains that it cannot compete as effectively as its competitors because Bell Atlantic alone is prohibited from bundling in-region, interLATA services with its

[5] Of course, any discounts offered must be cost-based and not reliant on cross-subsidies from other services.

[6] There are obviously substantial scale economies associated with the provision of high-capacity facilities. Because fiber must be buried, the construction of a single fiber route is relatively expensive. On the other hand, increasing the capacity of that fiber route becomes progressively less costly. Thus, on a circuit basis it is far cheaper to add a fiber line that carries thirty DS3s worth of traffic than to build a system that carries one DS3 or, conceivably, one DS1. Bell Atlantic's near monopoly provision of both local service and exchange access provides it with traffic flows that its competitors cannot yet begin to match.

high capacity services offerings. See e.g., Petition at Attachment B at 10 (complaining that Bell Atlantic cannot bundle long distance and high capacity services). But as should be obvious, Bell Atlantic does not need non-dominant carrier regulation in order to compete more effectively against its rivals. Rather, Bell Atlantic need only comply with the requirements spelled out in section 271 of the Communications Act, 47 USC §271. If Bell Atlantic needs to offer bundled services in order to compete against its rivals, then it should open its local markets to competition. Granting Bell Atlantic's petition would only dampen Bell Atlantic's incentives to open these markets in the 12 states at issue and throughout the Bell Atlantic Region.

VI. CONCLUSION

For the reasons stated above, the Commission should deny Bell Atlantic's Petition.

Respectfully submitted,

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March 18, 1999

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Opposition of Sprint Corporation** was sent by hand or by United States first-class mail, postage prepaid, on this the 18th day of March, 1999 to the parties on the attached list.

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